IN THE SUPREME COURT OF MISSOURI

SC 94844

RUTH MICKELS, et al.,

Appellants-Plaintiffs,

v.

RAMAN DANRAD, M.D.,

Respondent-Defendant.

Appeal from the Circuit Court of the County of Marion, Missouri
Cause No. 12MR-CV00727
Judgment dated February 10, 2014
Honorable Rachel Bringer Shepherd

Transferred after Opinion from the Eastern District
Court of Appeals (ED 101147) by Order of this Court

APPELLANTS' SUBSTITUTE BRIEF IN REPLY

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ARGUMENT

In the absence of Respondent's negligent failure to diagnose the cancer, Mr. Mickels would not have died on June 12, 2009.

I. Appellants have produced evidence of causation supporting submission of a wrongful death, medical malpractice claim.

"To show causation in any wrongful death case, a plaintiff must show that the negligence of the defendant 'directly cause[d]' or 'directly contribute[d] to cause' the patient's death." *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 306 (Mo. 2011) (reversing summary judgment in favor of defendant in a wrongful death, medical malpractice claim). Mr. Mickels's treating oncologist, Dr. Freter, was to testify at trial. As such, he was deposed by Respondent. Dr. Freter testified that if the tumor had been diagnosed in December of 2008, "the patient would live a number of months longer." LF0123 (p. 31). When asked how much longer, Dr. Freter was clear: "It's my medical opinion that it is more likely than not that if this had been discovered earlier, as has been alleged, then he would've lived an additional six months on the average." LF0130 (p. 61) (emphasis added). Dr. Freter confirmed that his opinions were made to a reasonable degree of medical certainty. LF0130 (p. 60-1). These facts and all reasonable inferences must be viewed in the light most favorable to Appellants. *ITT Comm. Financial Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993).

Respondent argues that the "directly contributed to cause" standard does not apply in wrongful death cases. Respondent's Substitute Brief, p.16. This argument is incorrect.

In *Sundermeyer* – like *Kivland*, a medical malpractice, wrongful death case – this Court provided a detailed discussion of the "directly contributed to cause" standard, to wit:

> [T]his Court has discussed that "'[t]wo causes that combine' can constitute 'but for' causation." *Harvey v. Washington*, 95 S.W.3d 93, 96 (Mo. banc 2003) (citing *Callahan*, 863 S.W.2d at 862). *Harvey* explains:
>
> > The general rule is that if a defendant is negligent and his [or her] negligence combines with that of another, or with any other independent, intervening cause, he [or she] is liable, although his [or her] negligence was not the sole negligence or the sole proximate cause, and although his [or her] negligence, without such other independent, intervening cause, would not have produced the injury.
>
> 95 S.W.3d at 96 (quoting *Carlson v. K–Mart Corp.*, 979 S.W.2d 145, 147 (Mo. banc 1998)).

***

> In *Callahan*, however, this Court cautioned that a causation analysis should not lose sight of the ultimate issue:
>
> > All of this discussion concerning the semantics of causation is less important in Missouri than in most jurisdictions because under MAI we do not use the terms 1) 'proximate cause,' 2) 'but for causation,' or 3) 'substantial factor' when instructing the jury. We merely instruct the jury that the defendant's

conduct must 'directly cause' or 'directly contribute to cause' plaintiff's injury.

863 S.W.2d at 863 (citing MAI 19.01 [1986 Revision] Verdict Directing Modification–Multiple Causes of Damage).

Sundermeyer v. SSM Regional Health Services, 271 S.W.3d 552, 554-5 (Mo. 2008). In reversing summary judgment in favor of defendant, this Court rejected defendant's argument that plaintiff's "expert's testimony [was] insufficient because he stated only that he thought [defendant's] conduct contributed to [decedent's] death, which is not proof of 'but for' causation." *Id.*, at 555.

Missouri Approved Instructions confirm the applicability of the "directly contributed to cause" standard. The verdict direction modification for multiple causes of damage states:

> In a case involving two or more causes of damage, the "direct result" language of paragraph Third of verdict directing instructions such as 17.01 and 17.02 might be misleading. In such cases, at plaintiff's option, one of the following may be substituted:
>
> Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

MAI 19.01. And the Notes on Use for MAI 19.01 specifically address the Instruction's application in cases like this:

> **Caution**: Where the verdict directing instruction is modified with one of the alternates in MAI 19.01 or an appropriate modification to submit

> "multiple causes" of damage in a case such as a death case, a products case, a premises case, or a medical malpractice case, care must be used in drafting a converse instruction by using substantially the same causation language as used in the verdict directing instruction. See *Hiers v. Lemley*, 834 S.W.2d 729 (Mo. Banc 1992).

MAI 19.01 (emphasis added). *See also*, *Honey v. Barnes Hosp.*, 708 S.W.2d 686, 692-3 (Mo.App. E.D. 1986) (affirming modification of MAI 20.02 by MAI 19.01 in a medical malpractice, wrongful death case).

Rather than acknowledging the applicability of this standard, Respondent argues that "the true test of causation is the 'but for' test." Respondent's Substitute Brief, p.17. This argument reveals a fundamental misunderstanding of causation, reminiscent of this Court's discussion in *Callahan*, to wit:

> Some lawyers and judges have come to look upon the "but for" test as a particularly onerous and difficult test for causation. Nothing could be further from the truth. "But for" is an absolute minimum for causation because it is merely causation in fact.

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 861-2 (Mo. 1993).

There is no dispute that Appellants must satisfy the "but for" test. Nor can there be a genuine dispute that Appellants meet that burden. The evidence before the Court is that, but for Respondent's negligence, Mr. Mickels would not have died on June 12, 2009.

Missouri also requires proximate cause, which is "something in addition to a 'but for' causation test…" *Id.*, at 865. It requires "that the injury must be a reasonable and probable consequence of the act or omission of the defendant." *Id.*, at 865.

The evidence before the Court also satisfies this test. When a doctor fails to diagnose a disease, injury or death from that disease is a reasonable and probable consequence. Here, Mr. Mickels's death on June 12, 2009 was the reasonable and probable result of Respondent's negligence.

II. Respondent's reliance on *Wollen* is misplaced.

Respondent claims that *Wollen* stands for the proposition that "a wrongful death claim does not exist in the context of a medical negligence action for failure to diagnose, where the decedent had a terminal illness and the terminal illness was going to cause the individual's death." Respondent's Substitute Brief, p.9. *Wollen* does not say this. *Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo. 1992).

Respondent confuses this Court's juxtaposition of three concepts of "medical certainty" with a pronouncement on the viability of cases like this. To delineate what *Wollen* did not involve, this Court described two hypothetical scenarios: one in which a timely diagnoses would have more than likely resulted in a cure; the other in which there was no cure and the patient's life could only have been extended a short time. *Id.*, at 682 (Mo. 1992). This Court then described a third scenario, consistent with the facts of that case, where plaintiff alleged that if defendant had made a timely diagnosis of cancer,

decedent would have had a 30% chance of survival. *Id.* This Court went on to adopt a claim for lost chance of recovery for the third scenario.

This Court did not, however, rule on the viability of the two hypothetical scenarios because those were not the facts of the case. Respondent's attempt to elevate the hypothetical scenarios in *Wollen* to the status of precedent is unfounded.

The use of hypotheticals is a clear example of dicta. Michael Abramowicz, *Defining Dicta*, 57 Stan. L. Rev. 953 (2005). Bestowing precedential value on hypotheticals could cause courts to devote excessive attention to, and purportly resolve, hypotheticals without adequate briefing, "thus undermining the goal of proper consideration." *Id.*, at 1037. And "[a]ssigning holding status to hypotheticals would diminish doctrinal clarity in the law, at least to the extent that abstract or tangential hypotheticals obscure what a judge was actually required to resolve in the immediate case." *Id.*

Indeed, as a preface to its description of the three hypotheticals, this Court acknowledged that the different scenarios "reflect the lack of clarity that can occur when the legal profession tries to impose its terms on other professions." *Id.*, at 682. A similar lack of clarity was confronted by this Court in *Kivland*, when it considered causation in wrongful death cases involving suicide. There, it was observed that courts, including some in this State, required a plaintiff to show "that the decedent was 'insane' and acting as a result of an 'irresistible impulse'…" *Kivland*, 331 S.W.3d at 309. This Court

rejected such a test as being unclear and, instead, held that the MAI "are perfectly adequate to submit the issue of causation." *Id.*, at 309-10.

The same is true in this case. A significant lack of clarity imbues a test that requires a disease to have a "cure," as mentioned in the hypothetical in *Wollen*, to not be "fatal," as required by the trial court, A2, or to not be "terminal" as suggested by Respondent. These are examples of the law imposing its terminology on medicine. But how long must a person live beyond the date of diagnosis to be deemed cured? Moreover, are diseases we think of as curable truly so?[1]

A test hinging on "survival" is similarly untenable. Respondent argues that "no matter when Mr. Mickels's cancer was diagnosed his chance of survival was zero percent." Respondent's Substitute Brief, p.14. This is not true. Mr. Mickels survived for four months after the diagnosis in February of 2009. And if the diagnosis had been made in December of 2008, more likely than not Mr. Mickels would have had six months of "additional survival." LF0124 (p.34).

Respondent and the trial court note that decedent's life was cut short by six months. But the holding would apply even if it were six years. Respondent and the trial court note that the cancer was aggressive. But the holding would apply even for

[1] *See e.g.* Kiel University, *Cancer: The roots of evil go deep in time* (June 24, 2014), http://www.uni-kiel.de/pressemeldungen/?pmid=2014-190-krebsstudie&lang=en ("cancer is as old as multi-cellular life on earth and will probably never be completely eradicated").

conditions which, though ultimately fatal, can be treated to delay death for many years, such as coronary artery disease, multiple sclerosis, HIV, and ALS.

Suppose a child sees a physician on a single occasion. At that time, the child has a condition which, with immediate treatment, will not take his life for twenty years. Without that treatment, death will occur in five years. The physician negligently – even grossly negligently – fails to diagnose the condition, and the child dies a few years later. Affirmation of summary judgment would bar a wrongful death claim by the child's family.

III. A wrongful death plaintiff need not prove that decedent would not have died, but only that decedent would not have died at that time.

Respondent argues that the law "requires the plaintiff to establish that the decedent would not have died." Respondent's Substitute Brief, p.20. This claim, without more, is incorrect. If this were the standard, no wrongful death case could proceed because no decedent "would not have died." Everyone will, at some point, die. As such, Respondent's claim is only correct if it includes a temporal component, to wit: "the law requires the plaintiff in a wrongful death case to show that the decedent would not have died at that time." In many cases it may be taken for granted that the timing of the death was affected by the tort. But to require proof that a person would not have died creates an insurmountable burden.

Moreover, requiring proof that the decedent would not have died at that time is consistent with the wrongful death act. Since a cause of action for wrongful death

accrues at the time of death, *Boland v. Saint Luke's Health System, Inc.*, No.SC93906 *11 (Mo. Aug. 18, 2015), what might have happened six months later is a matter for damages. Because the cause of action is complete upon death, it is clear that causation is proved by evidence that, in the absence of negligence, decedent would not have died when he did.

Missouri law is in keeping with this principle. In *Collins*, the jury found against three officers who each shot decedent, causing him to bleed to death. *Collins v. Hertenstein*, 90 S.W.3d 87 (Mo.App. W.D. 2002). The court granted JNOV as to an officer who fired a shot which, by itself, was insufficient to cause death but which did cause decedent to bleed. In reversing, the appellate court held that "'an act which accelerates death ... causes death[.]' This is true even if the act hastens death by merely a moment." *Id*., at 96 (internal citations omitted).

Respondent's attempt to whitewash *Collins* fails. A fair reading of the case dispels Respondent's suggestion that the above quotation is "merely dicta." Respondent's Substitute Brief, p.21. Instead, the quotation is integral to the court's holding. If the officer's act which accelerated the death could not be considered a contributing cause of death, then the JNOV would not have been reversed.

Moreover, the quotation from *Collins* on which Respondent relies dispels any argument that the rationale does not apply here. Respondent quotes:

> Although Thomas' gunshot alone should not have caused Wilson's death, the jury could have found that Thomas' acts coalesced with those of Hertenstein and Keeney to hasten Wilson's death; hence, the jury

> reasonably concluded that the bullet Thomas fired contributed to cause a single, indivisible injury for which Thomas could be held liable.

Respondent's Substitute Brief, p.21 (*quoting Collins*, 90 S.W.3d at 96). The same could be said in this case:

> Although Respondent's failure to properly read the MRI alone should not have caused Mr. Mickels's death, the jury could have found that Respondent's acts coalesced with the cancer to hasten Mr. Mickels's death; hence, the jury reasonably concluded that Respondent's negligence contributed to cause a single, indivisible injury for which Respondent could be held liable.

Collins is not a new or groundbreaking opinion. Courts have routinely reached the same conclusion. See *Strode v. St. Louis Transit Co.*, 95 S.W. 851, 852 (Mo. 1906) (finding it improper to instruct the jury that if "whatever injuries [decedent] received in said accident only hastened his death and were not the cause of the same, the plaintiff is not entitled to recover, and your verdict must be for the defendant"); *De Maet v. Fidelity Storage, Packing & Moving Co.*, 132 S.W. 732, 734 (Mo. 1910) (holding that despite "certain organic troubles which would have shortly terminated her life; yet if the negligence of the defendant hastened the result, it is yet liable").

Respondent's attempt to distinguish these cases as involving "affirmative acts of negligence" carries no weight. Respondent's Substitute Brief, p.23. That Respondent's negligence involved an omission is a distinction without a difference. "Actionable negligence consists in the breach or nonperformance of some duty which the party

charged with the negligent act or omission owed to the one suffering loss or damage thereby." *Settle v. Baldwin*, 196 S.W.2d 299, 302 (Mo. 1946) (emphasis added).

The equal treatment of acts and omissions is also reflected in the verdict directing instruction for medical malpractice claims:

> Your verdict must be for the plaintiff if you believe:
>
> First, defendant (here set out act or omission complained of; e.g., "failed to set plaintiff's broken leg bones in natural alignment," or "left a sponge in plaintiff's chest after performing an operation," or "failed to administer tetanus antitoxin"),

MAI 21.01 [1988 Revision] Verdict Directing – No Comparative Fault.

Regardless of whether a wrongful death claim involves an act or an omission, causation exists where a breach of duty contributes to cause a person to die at a time when he would not have in the absence of the breach. Clearly, whether the duty was breached by an act or an omission is of no consequence.

Respondent focuses on the cases of *Super v. White*, 18 S.W.3d 511 (Mo.App. W.D. 2000) and *Morton v. Mutchnick*, 904 S.W.2d 14 (Mo.App. W.D. 1995). Neither of these cases is persuasive.

As discussed more fully in Appellants' Substitute Brief, *Super* turned on the sufficiency of the evidence, as the plaintiff lacked the definitive testimony present in this case. Compare Dr. Freter's testimony in this case,

> "It's my medical opinion that it is more likely than not that if this had been discovered earlier, as has been alleged, then he would've lived an additional six months on the average."

LF0130 (p. 61), to the testimony in *Super*,

> Q. …So it would follow then, would it not, that you can't say with reasonable medical certainty that any specific act done by Dr. White caused Mr. Super to die in June, would you agree with that?
>
> A. I have to think about this. My answer to your question has to be that I cannot…

Id., at 517.

Super did not turn on the issue before this Court, but rather on the expert's equivocal testimony. While the court in *Super* stated that "[a]n action cannot be brought under the wrongful death statute, § 537.080, where the cause of death was merely accelerated," that reference was surplusage, appearing only after the court found plaintiff's evidence insufficient. *Id.*, at 519.

And as discussed more fully in Appellants' Substitute Brief, *Morton* is unreliable. It is inconsistent with prior opinions from this Court, with a more recent opinion from the same appellate court (*Collins*), and with numerous opinions from other jurisdictions, as described in *Petro v. Town of West Warwick ex rel. Moore*, 889 F.Supp.2d 292 (D.R.I. 2012).

More importantly, *Morton* is illogical, holding that "the harm plaintiffs claim was suffered was not the loss of life, but rather, a shortening of life." *Morton*, 904 S.W.2d., at 16. But what is the loss of life if not the ultimate shortening of life? Such a contrived distinction is meaningless to the family of the decedent. As Judge Kennedy noted in dissent, where the negligent failure to timely diagnose a terminal condition causes a person to die sooner than he or she otherwise would have, the delay in diagnosis is a cause of the patient's death. *Morton*, 904 S.W.2d at 18 (Kennedy, J, dissenting).

Respondent claims that the Court of Appeals "expressly recognized and approved the holdings of *Super* and *Morton*" in *Watson v. Tenet Healthsystem SL, Inc.*, 304 S.W.3d 236 (Mo.App. E.D. 2009). Respondent's Substitute Brief, p.31. This is not true. In *Watson*, decedent died from complications during placement of a central line. *Watson*, at 238. There was no allegation that decedent suffered from a terminal illness nor of a failure to diagnose. The solitary reference to *Super* in *Watson* is for the proposition that "a plaintiff must prove that, but for the defendant's actions or omissions, the patient would not have died." *Super*, 304 S.W.3d at 240. *Watson* does not even remotely address the issue of acceleration of death, which is the topic of *Super* on which Respondent so adamantly relies. And far from "expressly recongiz[ing]" *Morton*, that case is not even mentioned in *Watson*.

Respondent also relies on several opinions from other jurisdictions. While it may be obvious, it is worth noting that none of those cases involve Missouri's wrongful death statute, the body of case law which has developed around it, nor Missouri's case law and

jury instructions regarding causation. As such, they are not controlling in interpreting Missouri law. *See e.g. Boland v. Saint Luke's Health System, Inc.*, No.SC93906 *11 (Mo. Aug. 18, 2015) (rejecting citations to numerous cases from other jurisdiction).

Moreover, several of these cases lack evidence that a delay in treatment contributed to cause the death to occur at a time other than it would have in the absence of the delay. *See e.g. Ferrara v South Shore Orthopedic Assoc.*, 577 N.Y.S.2d 813 (N.Y. App. Div. 1991) (plaintiff failed to rebut defense affidavit that decedent's "course would have been essentially the same" without the delay and that the delay did not affect "the patient's prognosis"); *Thompson v. Anderson*, 252 N.W. 117 (Iowa 1934) (no evidence "that any treatment that the appellee might have administered to the appellant's decedent on the afternoon of August 30, 1932, would have been effective to prevent her death" two days later); *Burke v. Miners Memorial Hospital Ass'n*, 381 S.W.2d 758 (Ky. Ct. App. 1964) (plaintiff only produced evidence that proper diagnosis "might" have prevented death the following day); *Gooding v. University Hosp. Bldg., Inc.*, 445 So.2d 1015 (Fla. 1984) (delay in diagnosing a ruptured aortic aneurysm).

The other cases cited by Respondent are examples of the legal profession attempting to impose its terms on other professions; the problem recognized in *Wollen* and eliminated in suicide cases in *Kivland*. *See e.g. Tappan v. Florida Medical Center, Inc.*, 488 So.2d 630, 631 (Fla. Dist. Ct. App. 1986) (requiring evidence that "the patient probably would have survived"); *Bromme v. Pavitt*, 7 Cal.Rptr.2d 608, 618 (Cal. App. 1992) ("chance of surviving the cancer after June 1981 was less than 50 percent"); *Dowling v. Lopez*, 440 S.E.2d 205, 208 (Ga. Ct. App. 1993) (requiring proof that the

cancer was not terminal when first discoverable); *Elliott v. Kitowski*, 786 F.Supp. 917, 920 (D. Kan. 1992) ("nothing could have been done either to cure the cancer or give Elliott a substantial chance for survival"); *Parrott v. Caskey*, 873 S.W.2d 142, 149 (Tex. App. 1994) (lacking evidence of survival) (all emphases added). While these cases demand evidence of "survival," they fail to provide any meaningful, non-arbitrary test for measuring it.

As such, Respondent's out-of-state cases suffer the same flaw as *Morton*. These cases fail to recognize that causation exists where a breach of duty contributes to cause a person to die at a time when he would not have in the absence of the breach. And they ignore that the timing of a decedent's death is necessarily a factor in every wrongful death claim. The law can require no more than proof that decedent "would not have died *at that time*."

IV. Appellants' evidence supports a finding of causation.

In his final argument, Respondent argues that Dr. Freter's "testimony does not meet the requisite standard and is not sufficient to support causation." Respondent's Substitute Brief, p.42. This argument is wrong.

Dr. Freter testified that, if the tumor had been diagnosed in December of 2008, "it's my opinion that the patient would live a number of months longer." LF0123 (p.31). He further stated that "[i]t's my medical opinion that it is more likely than not that if this had been discovered earlier, as has been alleged, then he would've lived an additional six months on the average." LF0130 (p.61). Dr. Freter's opinions were to a reasonable degree of medical certainty. LF0130 (pp.60-1).

Dr. Freter's testimony and all reasonable inferences therefrom must be viewed in the light most favorable to Appellants. *ITT*, 854 S.W.2d at 376. This is particularly true since his testimony was only by way of a discovery deposition taken by Respondent in anticipation of his testimony at trial.

Respondent claims that "Dr. Freter's testimony only established the (sic) Mr. Mickels might have lived six months longer." Respondent's Brief, p.24. This is incorrect and indicative of Respondent's conflation of two separate questions. "Would Mr. Mickels have died on June 12, 2009 had there been a timely diagnosis of cancer?" is a different question than "How long would Mr. Mickels have lived had there been a timely diagnosis of cancer?" The former question addresses causation. The latter addresses damages.

Regarding causation, Dr. Freter testified that if the tumor had been diagnosed in December of 2008, "it's my opinion that the patient would live a number of months longer." LF0123 (p.31). Regarding damages, he agreed that decedent would likely have had six months longer on average, adding, "he might've had a year. He might've had, you know, less than six months." LF0123 (p.33). His testimony supports both the causation and damages elements of a wrongful death claim.

As discussed more fully in Appellants' Substitute Brief, that Dr. Freter's opinion of Mr. Mickels's life expectancy in the absence of negligence involves statistics is no different than the regular use of mortality tables as "guides or suggestions to the finder of fact." *Kilmer v. Browning*, 806 S.W.2d 75, 82 (Mo.App. S.D. 1991) (internal citations omitted). Any criticism of Dr. Freter's opinion of life expectancy in the absence of

negligence merely goes to its weight. *Kivland*, 331 S.W.3d at 311 (internal citations omitted) ("The jury will decide whether to accept the expert's analysis of the facts and the data.").

CONCLUSION

Appellants have presented evidence to satisfy each element required of a wrongful death claim. Respondent's negligence contributed to cause Mr. Mickels's death on June 12, 2009. If Respondent had discharged his duty, Mr. Mickels would not have died at that time.

The law cannot logically require proof that the decedent "would not have died," because everyone will die. The law can require only that the decedent "would not have died at that time." In many wrongful death cases, it is taken for granted that the timing of the death was affected by the tort at that time. This Court should breathe life into Judge Kennedy's dissent in *Morton* and make it clear that where the negligent failure to timely diagnose a terminal condition causes a person to die sooner than he or she otherwise would have, the delay in diagnosis is a cause of the patient's death. *Morton*, 904 S.W.2d at 18 (Kennedy,J, dissenting). And this Court should make clear that Missouri follows the rule in *Collins* – "an act which accelerates death…causes death" – rather than the dicta in *Super* – "[a]n action cannot be brought under the wrongful death statute, § 537.080, where the cause of death was merely accelerated." *Collins*, 90 S.W.3d at 96; *Super*, 18 S.W.3d at 518.

A rule that causation cannot exist in cases like this without proof of a "cure" or "survival" is artificial and reflects the lack of clarity forewarned in *Wollen*. Any attempt to delineate when a person is cured, or has sufficiently survived would be arbitrary. As it did with tests for insanity and irresistible impulses in *Kivland*, this Court should reject such tests here and hold that the MAI "are perfectly adequate to submit the issue of causation." *Kivland*, 331 S.W.3d at 309-10. The dispute in this case – whether Respondent's negligence contributed to cause Mr. Mickels's death on June 12, 2009 - "is a question whose answer can be well informed by the life experiences of 12 jurors." *Id.*, at 313.

Affirming the trial court and adopting Respondent's argument will absolve medical providers of liability for failure to diagnose in all cases where the undiagnosed condition would have eventually claimed the person's life. It will bar cases whether the person's life was cut short by six months, six years, or even decades. Even if couched in terms of causation, such a rule will effectively stand for the position that medical professionals have no duty to diagnose terminal illnesses. And it will treat negligent omissions of medical professionals differently from all other negligent acts.

Respondent's Motion for Summary Judgment should have been denied. This Court should reverse the trial court's Judgment so that the issues can be decided by the jury.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Rule 84.06(c), this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and contains 4,938 words, exclusive of the material identified in Rule 84.06(b), as determined using the word count program in Microsoft Word.

/s/ Thomas K. Neill

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the parties electronically through the Court's electronic filing system, on this 19th day of August, 2015, to:

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With a paper copied mailed, via first class U.S. mail, to:

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/s/ Thomas K. Neill